Supreme Court, U.S.
041228 MAR 9 - 2005

No. 04-

IN THE

Supreme Court of the United States

RICHARD E. WALL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A criminal defendant has a constitutional right to compel the attendance at trial of witnesses in his favor. In the case at bar, defendant was denied the opportunity to subpoena and examine two witnesses who could have impeached a government witness who implicated defendant in a conspiratorial meeting. Without holding a post-trial hearing to take the testimony of the two witnesses, the trial court instead granted a Rule 33 motion for new trial "in the interests of justice," thereby preserving defendant's Sixth Amendment right to examine the witnesses in a new trial.

Under these circumstances, does the Fifth Circuit Court of Appeals violate defendant's right to compulsory process by vacating the trial court's order for new trial without also remanding for an evidentiary hearing affording defendant the opportunity to examine the witnesses who could establish the merits of defendant's new trial motion?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF CITED AUTHORITIES	iii
TABLE OF APPENDICES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	1
SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	9
CONCLUSION	18

TABLE OF CITED AUTHORITIES

Page

CASES:

Roussell v. Jeane, 842 F.2d 1512 (5th Cir. 1988) ... 16

Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (U.S. 1988) 16

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967) 16

CONSTITUTIONAL PROVISIONS:

Amendment VI, U.S. Constitution ..... *passim*

STATUTES AND RULES:

18 U.S.C. § 3731 8

Fed. R. Crim. P. 33 ..... i, 9

28 U.S.C. § 1254 1

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Fifth Circuit Filed October 27, 2004 ..... 1a

Appendix B — Ruling On Motion For Judgment Of Acquittal And Motion For New Trial Filed September 25, 2003 ..... 34a

Appendix C — Order Of The United States Court Of Appeals For The Fifth Circuit Denying Petition For Rehearing Filed December 9, 2004 ..... 52a

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals is reported at *United States v. Wall*, 389 F.3d 457 (5th Cir. 2004). (Appendix to the Petition [hereinafter Pet. App.] at __). Wall's Petition for Rehearing was summarily denied in an unpublished decision on December 9, 2004. (Pet. App. at __).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment VI, U.S. Constitution:

> In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor. ...

SUMMARY OF ARGUMENT

The Fifth Circuit Court of Appeals has ruled that post-trial testimonial affidavits, one authored by witness Ristau (who refused to voluntarily provide a full statement), the other authored by defense counsel (because witness Hartwig first agreed then refused to provide any testimonial affidavit whatsoever), were insufficient to warrant a new trial. The Fifth Circuit's opinion, particularly the remedy called for by that opinion—reinstatement of the jury's guilty verdict—ignores and amplifies the unconstitutional deprivation of Wall's Sixth Amendment Right To Compulsory

Process, a deprivation that had been obviated by the trial court when it granted Wall's motion for a new trial. Although the trial court fashioned this order to obviate Sixth Amendment issues, the Fifth Circuit's opinion does not acknowledge or account for any Sixth Amendment violations, thereby arbitrarily denying Wall the right to put on the stand two witnesses capable of testifying to events that they had personally observed, and whose testimony would have been relevant and material to Wall's defense.

The Fifth Circuit's opinion should have remanded this case for a hearing affording Wall his Sixth Amendment Right of Compulsory Process—a right so far denied. Instead, the Fifth Circuit merely vacated, remanded, and reinstated Wall's conviction. In so doing, the Fifth Circuit has resurrected and perpetuated the denial of Wall's Sixth Amendment Right to Compulsory Process which the trial court had cured.

STATEMENT OF THE CASE

Richard Wall's case comes before this Court on his application for rehearing of the decision of the Fifth Circuit Court of Appeals vacating the trial court's order granting a new trial. Wall's petition for rehearing was limited to argument alleging denial of his right to compulsory process. Nevertheless, a broader factual review is helpful in understanding Wall's claim before this Court.

In a jury trial in the United States District Court for the Middle District of Louisiana, Richard Wall was found guilty one count of conspiracy (Count One) and eight counts of mail fraud (Counts Two through Nine). Wall was acquitted of several counts of making false statements, representations or claims to the United States (Counts Ten through Fourteen).

The government's indictment charged a conspiracy (Count 1 - Conspiracy) and a scheme (Counts 2-9) to sell to the Louisiana Department of Transportation and Development (LADOTD) material about which false claims (Counts 10-14) were made.

The charges involved an alleged agreement, from September of 1993 through October of 1997, to defraud LADOTD and the United States Department of Transportation in connection with polymer-coated steel pipe furnished for use in Louisiana highway projects. Prior to trial the prosecution dismissed certain counts and prior to closing argument the trial court dismissed others.

More particularly, the indictment alleged that, before September 15, 1995, the only polymer-coated steel product that had been approved for use in LADOTD road construction was a product, listed on QPL 43, consisting of steel manufactured and galvanized by Inland Steel Company, Inc. ("Inland"), and laminated with a polymer film by Pre Finish Metals, Inc. This polymer-coated steel product was manufactured by Inland under the name "Blac-Klad."

Defendant Richard Wall was the Manager of the Saint Louis Regional Sales Office of Inland and was charged with conspiring with others to knowingly and intentionally make use of an unapproved galvanizing company, National Galvanizing, and an unapproved laminator, Advanced Coil Industries ("Ad"), on 10 gauge steel sold by Inland for use in Louisiana road construction projects. As part of the conspiracy, the name of the laminator, ACI, was omitted from the stencil applied to the exterior of the steel coils. In furtherance of the conspiracy, the conspirators also allegedly used coils of steel manufactured by Wheeling Corrugated

Company ("Wheeling"), which was falsely labeled on the stencil on the exterior of the steel coils as being manufactured by Inland, rather than Wheeling, with Inland's trademark, "Blac-Klad."

Yet another part of the charged conspiracy was the fraudulent submission in March of 1995 of a falsely-identified sample of polymer-coated steel to cause polymer-coated steel pipe manufactured by Wheeling and coated by ACI to be approved and listed on QPL 43 on September 15, 1995. The conspirators allegedly knew that the sample submitted for testing and approval had been manufactured by Inland (not Wheeling) and laminated by PFM (not ACI). Although the government presented a parade of witnesses, Roger McDowell[1] was unique. McDowell testified that a scheme to conceal the name of the coater was discussed and—despite his protests—decided in the Chicago office of Bill Ristau. According to McDowell's testimony, Mr. Wall convened a conspiratorial meeting in Chicago attended by (1) Mr. Wall, (2) Mr. Wall's boss (Bill Ristau), (3) Mr. McDowell and (4) Mr. McDowell's boss (Dick Hartwig).[2] At this meeting (according to McDowell) the

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[1] As a result of the government's investigation, Roger McDowell pled guilty to misprision of a felony pre-indictment (Supp. ROA, Vol. 4, pp. 80-83).

[2] Nowhere in McDowell's lengthy grand jury testimony did he talk about the conspiratorial Chicago meeting. Neither did he say that there were two other participants in the meeting. In fact, during McDowell's grand jury appearance, the prosecution never even asked about a Chicago meeting, even though this meeting, according to McDowell's trial testimony, was the source of the conspiratorial decision to remove the name of the laminator from the stencil with the intent to conceal, deceive, and defraud.

parties agreed to deviate from the Louisiana standards by having the name of the laminator taken off the LADOTD-required stencil.

McDowell further testified that, at the Chicago meeting, the parties decided that the order would be filled without the laminator's name on the stencil just as Inland's customer had requested. Even though McDowell kept detailed notes of meetings on his day-timer, he could not remember when this meeting occurred, other than that, perhaps, it was within a week of his memorandum-letter.

There can be no mistaking what the prosecution desired the jury to believe and what Mr. McDowell claimed: this was not just "four men meeting in Chicago;" this was a conspiratorial meeting at which the discussion and decision was to remove the name of the laminator for the stencil in order to facilitate a deception, concealment and fraud.

In cross-examination McDowell left no doubt. The meeting was in Ristau's Chicago office. Mr. Ristau, Mr. Hartwig and Mr. Wall were present. Mr. McDowell raised his concerns to Mr. Ristau, telling him that the customer insisted the stencil be removed. This, McDowell swore, "was the one that nailed it." At another point of his testimony McDowell said he wasn't sure who said it to whom but he was dead certain that taking the laminator's name off the stencil "was the issue in the meeting." And regardless whether McDowell said it or "Mr. Wall or Mr. Hartwig or Mr. Ristau, himself; that was one of the issues" and "all four agreed" to remove the name of the laminator from the stencil even though the Louisiana specifications required the name be on the stencil.

Testifying on his own behalf, and in sharp contrast to McDowell, Richard Wall testified there was no such conspiratorial meeting, not in Chicago, not anywhere.

Thus, the jury's task was clear. It had to choose. The jury could believe Wall; the jury could believe McDowell. But the jury could not believe both of them. The significance of the conflict between Wall's and McDowell's testimony must not be lost in memory.

It later came to light that vital evidence that Mr. Wall could not have known existed was not brought into the courtroom, and it was evidence that would have altered the jury's decision. This evidence is the knowledge held by Mr. Ristau and Mr. Hartwig that no conspiratorial Chicago meeting occurred, that no conspiratorial discussion occurred, that no conspiratorial decision was made – just as Mr. Wall had testified to the jury.

Neither Ristau nor Hartwig would cooperate with Wall during preparation for trial. Wall could not know that McDowell's trial testimony would implicate Ristau and Hartwig along with him in the conspiratorial Chicago meeting. Ristau and Hartwig could not know it either.

In contrast, the prosecution repeatedly revisited the story of the conspiratorial Chicago meeting during trial.

Immediately after the guilty verdict spread throughout the community, Mr. Wall received a contact from Ristau to the effect that no conspiratorial Chicago meeting as claimed by McDowell occurred. Ristau went on to tell Wall that he had declined to discuss matters with Wall throughout the pre-trial period because he had been cautioned by prosecution authorities to have no contact or communication with Wall.

As a result of the Ristau contact, counsel attempted to contact Hartwig but was rebuffed until counsel hired an investigator who located Hartwig and served him with a subpoena. It was then and only then that Hartwig communicated with defense counsel. Hartwig was not represented by counsel. Hartwig advised defense counsel that he "remembered no such meeting as Mr. McDowell described and that he would remember any meeting at which wrongdoing was discussed, much less decided on." He further said he had never been interviewed by the government regarding this case, the Chicago meeting or McDowell's claims.

In sum, if Wall had recourse to Ristau and Hartwig's testimony at trial, there could have been impeachment on the central point that Wall convened a conspiratorial meeting in Chicago to defraud LADOTD.

In order to bring this new evidence to the court's attention before sentencing, Wall moved for a new trial within seven days of the verdict. Wall's motion was originally set for a May 30, 2002, hearing. Wall successfully served[3] both Ristau and Hartwig with subpoenas to appear for that hearing. Thereafter and upon objections by the government, however, the court cancelled and denied an evidentiary hearing. As a consequence, Wall, was barred from compelling the appearance and testimony of Ristau and Hartwig.

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[3] Not relevant herein but well established in the record and well treated in Wall's new trial memorandum and/or in briefs to this Court is that Ristau and Hartwig had avoided service prior to trial on the merits. But when Ristau learned Wall had been convicted, he came forward and assisted in obtaining service on Hartwig.

Counsel timely brought this deprivation to the trial court's attention. The trial court, in obvious recognition of the equities favoring Wall's position, chose to grant relief by ordering a new trial rather than ordering an evidentiary hearing. The trial court's ruling granting a new trial obviated any Sixth Amendment violation by calling for "an equal playing field." In the words of the trial court:

> This alleged conspiratorial meeting was a small piece of evidence in a lengthy and complex trial. However, if Mr. Ristau and Mr. Hartwig had testified for the defense, the government would not have been able to argue to the jury, moments before deliberation, that the defendant's entire case hung on the defendant's own uncorroborated testimony.
>
> Ultimately, this court is left with the unusual circumstance that, although defendant's newly discovered evidence was not, itself, material, the government made it material by capitalizing on it during closing argument. While the government no doubt acted in good faith, its suggestion to the jury that the defendant must be guilty because Mr. Ristau and Mr. Hartwig did not testify disrupted the "equal playing field between the prosecution and the defense necessary to allow the jury to perform its truth-seeking function." As such, this court grants defendant's motion for a new trial in the interest of justice.

(ROA, Vol.3, p.17, bates #000368; trial court's footnotes omitted). It is from this order that the government appealed, as authorized by 18 U.S.C. § 3731.

Petitioner, Richard Wall, now petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit (entered October 21, 2004, with rehearing denied on December 9, 2004) vacating the trial court's order and remanding the matter with instructions to re-instate the jury's verdict.

REASONS FOR GRANTING THE PETITION

The trial court in this case granted a new trial under the "interest of justice" standard of Fed. R. Crim. P. 33(a). The district court based its grant of a new trial on the government's comments in *rebuttal argument that Wall had failed to call witnesses* to corroborate his own defense testimony that an alleged conspiratorial meeting had not taken place. The district court reasoned that the government's comments "disrupted the equal playing field between the prosecution and the defendant" because Wall could not have know that the government would present testimony that there was a conspiratorial meeting until after that testimony had actually been given before the jury by government witness McDowell. The premise of Wall's argument all along has been that McDowell gave testimony that was *both* false *and* newly fabricated. McDowell claimed there was a four man conspiratorial meeting involving:

1) Government witness McDowell;

2) Defendant Wall;

3) Richard Hartwig; and

4) William Ristau.

Affidavits by defense counsel and by Richard Ristau submitted in support of a new trial showed:

> 1) That Wall's counsel had tried and been unable to serve either Hartwig or Ristau before trial, because they could not be located;
>
> 2) That immediately after hearing of Wall's conviction Ristau telephoned defense counsel to say an injustice had resulted, which Ristau had not expected else he would have made himself available.
>
> 3) That once a hearing had been set on Wall's motion for a new trial, defense counsel served Ristau with a subpoena and, with Ristau's assistance, located and served Hartwig with one.
>
> 4) Ristau agreed to and did execute an affidavit in which he denied Government witness McDowell's testimony about a conspiratorial meeting;
>
> 5) Hartwig, having contacted defense counsel only because he had been served, told defense counsel there was no conspiratorial meeting. Hartwig at first agreed to sign an affidavit – if it would avoid him having to travel to Baton Rogue to testify – then refused. (When the trial court denied an evidentiary hearing, Hartwig no longer expressed a willingness to provide an affidavit)

After subpoenas had been served on Hartwig and Ristau, the trial court *both denied* an evidentiary hearing – thereby

cancelling the already served subpoenas – and, thereafter, ***granted*** a new trial based on the interests of justice. The trial court thereby revealed its *conclusion that an evidentiary hearing was not needed*! The trial court's denial of ***compulsory process***, a denial of constitutional dimension, was clearly mooted when the trial court ***granted*** a new trial.

The trial court's assay of what had occurred before it held little weight in the opinion of the Court of Appeals. Even though defendant Wall had been denied the right to compel witnesses in support of his new trial motion, leaving him solely with "asking, begging and persuading" witnesses to provide affidavits, the Court of Appeals seized on the quality of Wall's affidavits in support of a new trial, criticizing the limitations of Ristau's affidavit, criticizing the fact that one of the putative witnesses did not provide an affidavit, and criticizing the fact that one of the affidavits came from Wall's own attorney. **All** of these deficiencies, if deficiencies they are, ***stem from Wall being denied the right to compel the attendance of witnesses in support of his motion for a new trial hearing***. As always, only the trial court saw the testimony of Government witness McDowell and sensed its affect upon the jury. The trial court was so satisfied that an injustice had resulted as to grant a new trial without the need for an evidentiary hearing. The Court of Appeals' opinion spins that fact around in order to conclude that the evidence Mr. Wall brought forward was not – to the Court of Appeals – enough.

The Court of Appeals may criticize all it likes, but once the trial court made it clear no evidentiary hearing was going to be held – the trial court found it did nor need one – defendant Wall was left to beg and persuade Ristau and Hartwig and to take what he could get. This is the very evil

the right to compel witnesses is meant to remedy. Those granted that right are not left to beg and persuade.

In rehearing application, defense counsel reminded the Court of Appeals that its ***remedy*** had *resurrected* and *effectuated* ***denial of defendant Wall's right to compel the attendance of witnesses in support of his motion for a new trial!*** Defendant Wall has shown, and this record amply supports a finding, that there is substantial reason to believe that the criticisms levied by the Court of Appeal in reversing the trial court and denying Wall's new trial would have been cured had Wall been allowed to compel the witnesses to come to court to testify to the whole truth about the so-called conspiratorial meeting about which defendant Wall first heard in the midst of trial.

If the trial court believed – as it has stated – that the government's exploitation of Mr. Wall's inability to call witnesses to rebut Roger McDowell's statements affected the verdict in this case, then the trial court's actions should not be viewed through the appellate court's 20/20 lenses, but through the able eyes of a trial judge. He sat through the whole trial; he sensed the mood; and he examined the faces. And he thought that to subject Mr. Wall to trial and conviction in which potentially pivotal evidence had been omitted was to subject Wall to an unfair trial. That the trial court sought to remedy the situation by ordering a new trial should merit the court's commendation, not condemnation by the demeaning label: abuse of discretion.

In its decision vacating the order granting Wall a new trial, the Fifth Circuit takes the trial court to task for considering as "material" the affidavits containing Ristau and

Hartwig's denial that Wall convened a conspiratorial meeting in Chicago to defraud LADOTD.[4] Specifically, the Court states:

> The district court relied on the alleged testimony of both Ristau and Hartwig when it analyzed the *Berry* test. Although Ristau provided an affidavit, Hartwig refused to provide a statement. In evaluating Hartwig's proposed testimony, the district court had before it only representations from defense counsel repeating statements that Hartwig had made to counsel. Other circuits have held that a motion for new trial may not be based on inadmissible evidence. See *United States v. Parker*, 903 F.2d 91, 102-03 (2d Cir. 1990); *United States v. MacDonald*, 779 F.2d 962, 964 (4th Cir. 1985). *Thus far, Wall has submitted only inadmissible hearsay from Hartwig.* We conclude that the district court's reliance on Hartwig's hearsay testimony was erroneous.[5]

The Court goes on to add:

> Ristau's affidavit is of marginal value to Wall's defense. Ristau's affidavit actually makes no reference to whether Wall did or did not participate in a meeting in Chicago, only that Ristau himself did not participate in a meeting in which he "knowing that the State of Louisiana's

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[4] *United States v. Wall*, No. 03-30987 slip op. at 19-20; __ F.3d __, 2004 WL 2397374, 5th Cir.(La.), Oct 27, 2004.

[5] *Id.*, at 19-20 (emphasis supplied).

> specifications required the name of the laminator to appear in the stenciling on the product, agreed to have the product produced in violations [sic] of those specifications and did not disclose that to the State." Ristau's statement is very carefully and narrowly worded. Ristau does not say that a meeting was not held by these same participants in Chicago, or elsewhere, in which this very topic was discussed. He does not even deny that a meeting or discussion took place in which these same participants agreed to change the stencils at Caldwell's request. He merely denies that such a meeting took place at a time when Ristau knew that Louisiana required the name of the laminator to appear on the stenciled product and that he agreed to the change without notifying the State of Louisiana. The affidavit denies Ristau's culpability, but touches only indirectly on Wall's participation in the conspiracy. The district court erred in concluding that Ristau's statement was material.[6]

What the Fifth Circuit's opinion overlooks, particularly *in the remedy it fashions* and in reaching the above cited conclusions, is that the trial court's new trial order obviated the earlier deprivation of Wall's Sixth Amendment Right To Compulsory Process, an infringement, which if allowed to stand, would be, and now is, of Constitutional proportion.

Wall's motion for new trial was originally set for a May 30, 2002, hearing. Wall successfully served[7] both Ristau

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[6] *Id.*, at 20.

[7] Not relevant herein but well established in the record and well treated in Wall's new trial memorandum and/or in briefs to this Court (Cont'd)

and Hartwig with subpoenas to appear for that hearing. Thereafter and upon prosecution objection, however, the Trial Court *cancelled and denied an evidentiary hearing*! Thus was Wall denied not only an evidentiary hearing BUT ALSO his Sixth Amendment Right to Compulsory Process! Counsel timely brought this deprivation to the Trial Court's attention. The Trial Court's ruling granting a new trial obviated the Sixth Amendment violation. This Court's opinion – particularly the remedy it fashions – at once resurrects and elevates to anything but harmless this Sixth Amendment infraction.

Under such circumstances, it is utterly unreasonable to fault Wall for deficiencies in Ristau and Hartwig's statements and affidavits when, in fact, Wall was denied an opportunity to present their compelled testimony and examine them for the record. Without compulsory process, Wall was left a beggar for witness statements, unable to insist on penetrating questions, afraid of offending witnesses for fear they would, again, turn their backs on him. In short, those deficiencies at which the Sixth Amendment Right to Compulsory Process was intended to strike fell upon Wall, crippling his effort to provide testimony in support of his new trial motion.

Exclusion of a defendant's evidence can amount to a violation of the right to compel the attendance of witnesses in the defendant's favor. In pertinent part, the Sixth Amendment provides that in all criminal prosecutions the defendant shall "have compulsory process for obtaining

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(Cont'd)
is that Ristau and Hartwig had avoided service prior to trial on the merits. But when Ristau learned Wall had been convicted, he came forward and assisted in obtaining service on Hartwig.

witnesses in his favor." U.S. Const. amend. VI. "The compulsory process clause is not limited to providing a subpoena power, but extends to the right to present evidence to the fact finder." *Roussell v. Jeane*, 842 F.2d 1512, 1515 - 1516 (5th Cir. 1988) citing *Taylor v. Illinois*, 484 U.S. 400, 108 S. Ct. 646, 649-51, 98 L. Ed. 2d 798 (U.S. 1988). In *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the Supreme Court found a violation of this Clause of the Sixth Amendment when the defendant was arbitrarily deprived of "testimony [that] would have been relevant and material, and . . . vital to the defense." 388 U.S., at 16, 87 S. Ct., at 1922.

Wall urges that by not holding his requested evidentiary hearing for his new trial motion, the trial court deprived him of the right to compel the testimony of Ristau and Hartwig; testimony that would have been material and relevant; testimony that would have been essential not only to Wall but also to a finding of the truth. However, by granting Wall's new trial request, the trial court indirectly mooted the Sixth Amendment deprivation. This Fifth Circuit's opinion, however, reinstates this deprivation of Sixth Amendment Rights.

It is submitted that the protection of Constitutional Rights is a duty imposed by the Constitution on every level of the Article 3 courts. The trial court did not reach the Constitutional deprivation, however, because it granted a new trial. The Fifth Circuit's opinion, particularly its remedy of merely reversing, reinstating and remanding, resurrects – nay, it compounds – the Constitutional deprivation and aggravates the infraction. It criticizes Wall's new trial presentation as being inadequately supported even though Wall was never afforded the Right of Compulsory Process necessary to provide such support.

The syllogism effectuated by this Court's remedy goes like this:

a) Wall must provide evidence that a new trial is warranted;

b) Wall is denied the right to compel witnesses to give that evidence and must rely, instead, on second class, insufficient proof;

c) Because he provided only second class, insufficient proof, Wall is denied a new trial.

Such a combination cannot stand in the face of the Sixth Amendment's explicit guarantee of the Right of Compulsory Process. The Fifth Circuit's opinion, particularly in its failure to require that Wall's Sixth Amendment deprivation be remedied on remand, fails to recognize Wall's rights as a criminal defendant, and breathes vigor and new life into their denial. Even if the Fifth Circuit's reasoning is sound, the remedy should be to remand this case for a hearing before the trial court in which Wall is afforded a Sixth Amendment Right To Compulsory Process and is no longer left begging witnesses to speak.

CONCLUSION

The Sixth Amendment to the United States Constitution compels that Wall should have had the Right To Compel the testimony of witnesses, such as Ristau and Hartwig, on facts material and relevant to his new trial application.

Wall asks this Court to reverse the decree of the Fifth Circuit Court of Appeal and remand this matter to the trial court for an evidentiary hearing in which Compulsory Process is a reality and in which the testimony of witnesses such as Ristau and Hartwig may be compelled.

Respectfully submitted,

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